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Supreme Court of the United States.

OCTOBER TERM, 1962.

No.

ARTHUR MARCUS, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Arthur Marcus, defendant in proceedings against him in the United States District Court for the District of Delaware for criminal contempt and appellant in the United States Court of Appeals for the Third Circuit, prays that a writ of certiorari issue to review a final judgment of the said United States Court of Appeals entered on November 28, 1962, pursuant to an opinion of the same date affirming the conviction and sentence of the District Court.

Opinion Below.

The District Court wrote no opinion. The opinion of the United States Court of Appeals is not yet officially reported but is set forth in the Appendix hereto (pp. 23-30).

Jurisdiction.

The final judgment of the United States Court of Appeals for the Third Circuit was entered on November 28,

1962, and affirmed the judgment of the United States District Court for the District of Delaware adjudging the petitioner in contempt. The jurisdiction of this Court is invoked under section 1254(1) of the Judicial Code (28 U.S.C. § 1254), to review the final judgment of the United States Court of Appeals for the Third Circuit, and this petition is filed pursuant to Rule 37(c) of the Rules of Criminal Procedure (18 U.S.C. § 3771) and the Rules of this Court.

Questions Presented.

1. Whether a witness testifying before a Grand Jury is protected by the immunity provisions of section 409 of the Federal Communications Act (Title 47) where the Grand Jury's investigation is primarily based upon alleged violations of other Acts and only indirectly on violations of the Communications Act.

2. Whether the Government in applying for the order to compel the testimony of the petitioner has sufficiently shown that the Grand Jury investigation is "a cause or proceeding based upon or growing out of" alleged violations of the Federal Communications Act.

Statutes Involved.

The statute involved is the Federal Communications Act (47 U.S.C. §§ 151-609) and more particularly subsection (l) of section 409, which is set forth in the Appendix hereto (pp. 31-36), which provides immunity to a witness in a cause or proceeding based upon or growing out of alleged violations of this Act.

Also involved is the Act prohibiting the use of wire communication facilities for the transmission of bets or wagers (18 U.S.C. § 1084), particularly section 1084(c), which is set out in the Appendix hereto (pp. 36-37).

Statement of the Case.

In April, 1962, the petitioner appeared, in response to a summons, before a Grand Jury called together for the purpose of an investigation into violations of the interstate transmission of wagering information (18 U.S.C. § 1084) and other crimes. The petitioner, invoking the protection of the Fifth Amendment, refused to answer most of the questions propounded to him. Accordingly, the Government on April 2, 1962, applied to the District Court for an order immunizing the petitioner under 47 U.S.C. § 409. The application for immunity included an oral statement by the Special Attorney appointed to take part in the Grand Jury proceedings relative to the scope of the proceedings (*infra*, pp. 11-12) and a recitation of the questions propounded to the witness (R. 3A-33A). Also available to the Court was the Department of Justice letter of authorization to the Special Attorney which defined the scope of the intended proceedings.

The District Court, after briefs and argument by counsel, decided that the immunity provision was applicable and entered an order on April 17, 1962, granting the application for immunity (R. 37A) and, on April 18, 1962, from the bench ordered the petitioner "to answer completely and truthfully all questions propounded to you in the course of your forthcoming appearance before the grand jury" (R. 40A).

Later the same day, the petitioner having persisted in his refusal to answer, the Government instituted a criminal contempt proceeding against the petitioner under 18 U.S.C. § 401, and on the following day, April 19, 1962, the petitioner was tried before the Court after having been notified by the Court pursuant to the provisions of Rule 42(b) of the Federal Rules of Criminal Procedure (18 U.S.C.). He was found guilty and sentenced to imprisonment for six months (R. 42A).

The petitioner appealed to the United States Court of Appeals for the Third Circuit, which Court entered judgment on November 28, 1962, affirming the judgment below (R. next to last page). On application of the petitioner a stay of mandate was granted by the said Court of Appeals on December 11, 1962, pending a determination by this Court (R. last page).

Reasons for Granting the Writ.

The Court below held that the Grand Jury proceeding here was a cause or proceeding "based upon or growing out of . . . alleged violation of" the Communications Act [47 U.S.C. §§ 151-609, particularly § 409(l)] (Appendix, pp. 31-36); that accordingly, immunity might properly be granted to the petitioner under that Act; that the immunity so conferred is as extensive as his privilege under the Fifth Amendment; and that his refusal to testify thereafter was a contempt of court of which he was properly found guilty. The Court relied upon *Brown* v. *United States*, 359 U.S. 41 (1959).

The petitioner maintains that the Court erred in holding that the Grand Jury investigation was a cause or proceeding "based upon or growing out of" violation of the Communications Act.

As the record plainly shows, the Grand Jury proceeding here was initiated by the Department of Justice for the primary purpose of disclosing violations of *other* Acts and was concerned only incidentally and peripherally with violations of the Communications Act and, in any event, the Government has not sustained the burden of establishing beyond a reasonable doubt that the proceeding was one in which the use of the immunity clause was authorized.

If permitted to stand, the decision below would approve the use by the Government, in a manner not sanctioned by

Congress, of the immunity provisions of one Act for the enforcement of other Acts in which Congress had refused to authorize the use of that enforcement tool.

Argument.

I. Read in context and properly construed, the words "based upon and arising out of" mean a proceeding the primary purpose of which is the enforcement of the Communications Act.

Congressional intent to this effect is clearly demonstrated by a reading of section 409 in its entirety (Appendix, pp. 31-36) and of subsection (l) in its context.

Subchapter IV of the Act (§§ 401-415) is entitled: "Procedural and Administrative Provisions."

Section 401 (which provides for enforcement of the chapter and orders of the Commission) provides:

> (a) that a District Court shall have jurisdiction to issue writs of mandamus commanding compliance with the provisions of this chapter.
>
> (b) that a District Court may enforce obedience to any order *of the Commission.*
>
> (c) that, *upon the request of the Commission,* it shall be the duty of any United States Attorney to prosecute proceedings to enforce the chapter and punish violations thereof.

Section 402 provides for judicial review of the *Commission's* orders and decisions.

Section 403 authorizes the *Commission* on its own motion to institute inquiries and to make and enforce orders relating to the enforcement of the provisions of this chapter.

Section 404 requires reports *by the Commission* of its investigations.

Section 405 provides for rehearings on orders, decisions and reports of the *Commission.*

Section 406 makes available to persons aggrieved by a carrier's violation of the chapter a remedy by writ of mandamus in a District Court.

Section 407 provides for the enforcement in the District Courts of orders for the payment of money.

Section 408 prescribes the time when orders *of the Commission* become effective.

Section 409 deals with administrative procedures in the enforcement of the Act.

(a) concerns the conduct of hearings *by the Commission.*

(b) concerns the filing of exceptions and memoranda by parties to the proceedings *before the Commission.*

(c) further concerns the procedure in proceedings *before the Commission.*

(d) provides that the Administrative Procedure Act shall apply.

(e) grants *to the Commission* the power to require by subpena the attendance and testimony of witnesses and the production of records.

(f) provides that witnesses may be summoned from anywhere in the United States and that the aid of the District Courts may be invoked *by the Commission* to compel obedience to *its* subpena.

(g) provides that the District Courts may require witnesses to appear and produce records and give evidence *before the Commission* and punish for contempt for failure to obey an order to do so.

(h) (i) (j) and (k) provide for the taking and use of depositions in proceedings pending *before the Commission.*

(l) provides:

"No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, and documents *before the Commission,* or in obedience to the subpena *of the Commission,* whether such subpena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of *this chapter,* or of any amendments thereto, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying." (Emphasis added.)

(m) provides penalties (fine or imprisonment or both) for persons convicted by a Court of competent jurisdiction of failing to obey a subpena *of the Commission.*

It is thus seen that the entire section relates to the enforcement of the Act *by the Commission* with the aid of the Courts and of the United States Attorneys *upon the request of the Commission.*

All of the powers granted, all of the procedures provided (including the immunity provisions of subsection (l)), are designed primarily for the use of the Commission in the enforcement of *this Act.*

And when Congress in subsection (l) made immunity available to any person testifying "in any cause or proceeding, criminal or otherwise, *based upon or growing out of* any alleged violation *of this chapter*" (emphasis added), it had in mind proceedings initiated *by the Commission* for the purpose of enforcing *this Act*.

There is nothing in the entire section, indeed in the entire Act, which suggests that Congress intended to sanction the use of the immunity provisions of the Act in a proceeding aimed primarily at the enforcement of other related or unrelated Acts. Properly construed these provisions plainly negate any Congressional intent that they should be so employed.

II. The record shows an attempt by the Government to use the immunity provisions of 47 U.S.C. § 409, in a manner not authorized by the Communications Act.

A. The immunity provisions of the Communications Act were employed here primarily in the investigation of violations of numerous other Acts which do not contain provisions for immunity.

1. The purpose and nature of the "proceeding" which is here involved must be judged by the terms of the authorization therefor, the statements of intent of the Special Attorney, and the nature of the questions propounded to the witness.

The situation encountered in the case at bar poses the question as to how the nature of the proceeding may be determined.*

*A question similar to that here involved was raised but not passed upon in *Counselman* v. *Hitchcock*, 142 U.S. 547, at 561, 562 (1892), and it does not appear to have been definitively passed upon by this Court since.

That this must be decided before the witness is ordered to testify is apparent.

The strictness and rigidity with which the test must be applied and the exactitude of proof of compliance required in the application of immunity provisions is demonstrated (although in a somewhat different context) in *In re Bart*, 304 F. 2d 631 (C.A. Dist. Col., 1962). See also *Ullmann* v. *United States*, 350 U.S. 422, 426 (1956).

In *United States* v. *Onassis*, 125 F. Supp. 190, 200, 201 (D.C. Dist. Col., 1954), in determining the nature of the proceeding, the Court rejected the letter of authorization for the proceeding; but in that case the Court had before it other and more compelling evidence; moreover, the Grand Jury proceeding had there been completed.

Whatever the ultimate test should be, the Court at this juncture can only determine whether the Courts below were justified *on the evidence before them* in concluding that the use of the immunity clause was sufficiently shown to have been authorized by the Act.

In the instant case the Courts below had before them only the letter from the Department authorizing the proceeding, the statements of the Special Attorney and the questions propounded to the witness before the Grand Jury up to the time when immunity was sought.

2. The letter of authorization demonstrates that disclosure of violations of the Communications Act was not the primary basis for the proceeding.

The letter of authorization reads, in material part, as follows:

> "The Department is informed that various persons, companies, corporations, firms, association, and organizations to the Department unknown, have violated in

the District of Delaware, and in other judicial districts the bankruptcy, bribery, fraud, internal revenue, slot machine, racketeering, labor management relations, perjury, obstruction of justice, stolen property, conspiracy, the Federal Communications Act, transmission of gambling information, travel in aid of racketeering enterprises, interstate transportation of wagering paraphernalia, and other criminal laws of the United States, and have conspired to commit all such offenses and to defraud the United States in violation of Section 371 of Title 18 of the United States Code." *

The letter alleges violations in some sixteen different categories. These sixteen categories encompass innumerable Acts of Congress defining criminal conduct.† For example: "Bribery" is found in thirty or more Congressional enactments; "fraud" is subjected to criminal penalties in some twenty specific contexts in the Code; the Internal Revenue Code not only may be violated in some fifteen different ways set forth therein, but there are also at least three crimes having to do with Internal Revenue under other Acts.

Research, limited by the time available, indicates that the letter of authorization includes over one hundred and

*A certified copy will be found appended to the record. This document, while not formally made a part of the record below by inclusion in the Appendix to Appellant's Brief, was a part of the District Court record which was transmitted to the Court of Appeals (see Docket Entries, Item 1) and was referred to and relied upon by the parties in argument and by the Court of Appeals in its opinion (Appendix, p. 28).

† Counsel believes, on the basis of limited research, that the Bankruptcy Act and the Internal Revenue Code are the only ones of the Acts listed (aside from the Communications Act) which contain immunity provisions.

thirty specific crimes which are encompassed by the alleged violations upon which the Grand Jury proceeding is alleged to be based or out of which it arises. These crimes are set forth in at least twenty different "Acts," of which the Communications Act is but one.

That the Communications Act appears well down the list is at least some indication that the proceeding is not intended to be *basically* or *primarily* an investigation under that Act.

If the letter tends to show anything with reference to the proposed investigation, it is that the Government intends to make the inquiry as broad and encompassing as possible and that it does not intend that it be restricted in any way to any specific line of inquiry under any particular Act, let alone the Communications Act.

3. The statements of the Special Attorney show that disclosure of violations of the Communications Act was only incidental to the basic purpose of the proceeding.

The statement made by the Special Attorney when seeking immunity and an order to compel the testimony of the witness was as follows:

> "Mr. Corey: This is a problem that arises out of testimony of a witness before the grand jury that is presently in session. The grand jury is inquiring into violations under statute 1084, under the transmission of interstate wagering information; also under the interstate travel violation, which I believe is Section 1053; possibly under Section 2 of Title 18, aiding and abetting; possibly under the conspiracy act; under the internal revenue statutes; under the Federal Communications Act, if I haven't already mentioned it." (R. 3A.)

Taking this statement at its face value, it appears that the *primary* purpose of the proceeding is an inquiry directed at violations of 18 U.S.C. § 1084, having to do with the transmission of racing, wagering or gambling information, and section 1073, having to do with travel in interstate commerce to avoid prosecution. It mentions violations of section 2 (aiding and abetting the commission of an offense against the United States) and conspiracy as "possibilities," and concludes with violations of the internal revenue statutes "and under the Federal Communications Act, *if I haven't already mentioned it.*" (Emphasis supplied.)

The anti-climactic inclusion of the Communications Act, almost as an afterthought, demonstrates clearly that the Special Attorney did not intend that the proceeding be *primarily* concerned with violations of that Act.

This is confirmed by two other statements made by Mr. Corey. During the hearing on the application for the granting of immunity and an order to compel testimony, counsel for the petitioner herein stated:

> "During that time Mr. Corey stated to us that the inquiry was concerned with race wire violations and information"—

to which Mr. Corey agreed (R. 13A). Corey subsequently amplified this as follows:

> "In addition to stating that this was an inquiry into race wire operations I stated that there might be some tax liabilities involved." (R. 16A.)

We see here additional evidence that the proceeding was one "based upon and growing out of" alleged violations of the Race Wire Act and the Internal Revenue Code, not of the Communications Act.

4. The questions propounded to the witness also indicate that violations of the Communications Act were quite incidental, and not the "basis" or primary purpose of the inquiry.

While it is not possible to fathom the purpose of many of the questions, even when read in the context of the overall examination, it seems fair to say that, of about ninety substantive questions, not more than two (R. 27A; R. 3) were directed exclusively to subject matter solely within the Communications Act and not more than ten or twelve appear susceptible of disclosure of facts which might have a bearing on violations of that Act (R. 3, 4, 5, 6, 33, 35, 36, 37, 38, 69, 70, 71). On the other hand, nearly two-thirds of the questions appear to have been directed to race wire and wagering subjects, and some quite obviously concern only internal revenue matters.

This, of course, confirms the statements of the Special Attorney that the inquiry concerned "race wire violations" and "tax liabilities."

B. An attempt to use the immunity-granting privilege, without request or sanction by the Commission, as a blanket immunity in the investigation of alleged violations of numerous other related and unrelated Acts under which no immunity is otherwise available is contrary to the authority given in the Communications Act.

Congress and the Courts alike have made it clear that the misuse of immunity provisions is to be carefully guarded against.

See 2 U.S. Code Congressional & Administrative News, 83d Cong. 2d Sess., 1954, pp. 3059, 3062, 3064, 3065.

In Re Bart, 304 F. 2d 631, 634 (C.A. Dist. Col., 1962).

Brown v. *Walker*, 161 U.S. 591 (1896).

United States v. *Onassis*, 125 F. Supp. 190, 196 (D.C. Dist. Col., 1954).

Congress has never enacted a blanket immunity Act applicable to all crimes, but has carefully restricted its grants of immunity to *proceedings to enforce certain specific Acts* as to which it has decided the use of this enforcement tool is appropriate. As the Government stated in its brief below, the immunity provisions under the Interstate Commerce Act, 49 U.S.C. § 46, enacted in 1893 and upheld in *Brown* v. *Walker*, 161 U.S. 591, in 1896, became the model for later Acts all of whose provisions are identical in the scope of the immunity offered.

See Dixon, "The Fifth Amendment and Federal Immunity Statutes," 22 George Washington Law Review, 447 (1954).

In selecting only a few specific Acts and in restricting the use of the immunity provisions in each case to proceedings "based upon or growing out of" violations of *that* Act, Congress has manifested an intent that they be used *primarily*, if not exclusively, in the enforcement of that particular Act.

The history of the immunity clauses, as well as the language of the section itself read in its entirety (*supra*, I), thus demonstrates conclusively a Congressional intent that they be not used generally and in blanket form, in the manner in which the Government seeks to use them here, and such use must be held to be unauthorized.

III. THE GRANTING OF IMMUNITY IN A PROCEEDING AIMED PRIMARILY AT DISCLOSURE OF SECTION 1084 VIOLATIONS IS CONTRARY TO THE SPIRIT AND INTENT OF SUBSECTION (c) OF THAT ACT.

As already shown (*supra*, II), the Grand Jury investigation was directed basically at uncovering violations of the Transmission of Wagering Information Act (18 U.S.C. § 1084, Appendix, pp. 36-37).

But this Act contains the significant provision that—

> "(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia."

Congress clearly manifested an intent that immunity should be so restricted as not to interfere with the enforcement by the States of violations of their gambling and wagering statutes. In fact, the Act itself was passed as an *aid* to the States in suppressing gambling and bookmaking.

> "The purpose of the bill is to assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities by prohibiting the use of wire communications facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce."
>
> 2 U.S. Code Congressional & Administrative News, 1961, p. 2631.

"Subsection (c) would make certain that the Federal Government is not preempting the area encom-

passed by the bill. Thus, the right of a State to prosecute for a violation of its penal laws is preserved by this subsection which is a disclaimer of any possible preemption by the Federal Government."

Ibid., p. 2633.

The immunity under 47 U.S.C. § 409 (l), if effectively granted, would bar prosecution of the witness in any State Court by reason of any matter or thing disclosed by the witness in his testimony.

Reina v. *United States*, 364 U.S. 507 (1960).
Brown v. *Walker*, 161 U.S. 591, 608 (1896).

While section 1084(c) is not a direct prohibition against the granting of immunity, the use of the immunity provisions of another Act when seeking to enforce section 1084 is clearly contrary to the intent and spirit of subsection (c).

IV. IN ANY EVENT, THE GOVERNMENT HAS FAILED TO ESTABLISH BEYOND A REASONABLE DOUBT THAT THE PROCEEDING WAS ONE IN WHICH THE USE OF THE IMMUNITY PROVISIONS WAS SANCTIONED BY CONGRESS.

A. The burden of proof of this issue is on the Government.

On a charge of criminal contempt the defendant is presumed to be innocent, and must be proved to be guilty beyond a reasonable doubt.

Gompers v. *Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911).
Parker v. *United States*, 153 F. 2d 66, 70 (C.A. 1st, 1946).
United States v. *P. & W. Coat Co.*, 52 F. Supp. 792 (E.D. N.Y., 1943).

In re Bart, 304 F. 2d 631, 637 (C.A. Dist. Col., 1962).

And see *Blau* v. *United States*, 340 U.S. 332 (1951).

B. The Government has failed to sustain that burden.

As will be later shown, the validity of the conviction depends upon whether the grant of immunity was so authorized as to effectively provide protection from prosecution equivalent to the protection of the constitutional privilege which it replaces.

And, if the Court is not satisfied beyond a reasonable doubt that this is so, it may not validly compel the witness to answer, nor find him guilty of contempt for failure to do so.

Hence, unless the Government has shown that the proceeding was indubitably one "based upon and arising out of alleged violations of" the Communications Act within the meaning of those words as used by Congress, the judgment must be reversed.

The United States Attorney in his enthusiastic pursuit of criminals must not misuse the enforcement tools made available to him, nor treat lightly the constitutional privileges of his witnesses. The liberties involved are as sacred as any granted by the Constitution, and he must demonstrate that he has not exceeded the statutory powers granted to him.

Moreover, statutes which impinge upon constitutional rights must be strictly construed. As this Court said in the *Ullmann* case, the petitioner's claims must be approached.

> ". . . in this spirit of strict, not lax, observance of the constitutional protection of the individual."
>
> *Ullmann* v. *United States*, 350 U.S. 422, 429 (1956).

One notes also the strictness and exactitude with which the Courts have scrutinized the application of immunity provisions in other cases.

In re Bart, 304 F. 2d 631 (C.A. Dist. Col., 1962).
United States v. *Onassis*, 125 F. Supp. 190 (D. C. Dist. Col., 1954).
United States v. *Andolschek*, 142 F. 2d 503 (C.A. 2d 1944).
United States v. *Goldman*, 28 F. 2d 424 (D.C. Conn., 1928).

The protection of the petitioner's constitutional rights requires that the immunity be made fully, clearly and properly available before the witness may be denied his constitutional privilege.

Counselman v. *Hitchcock*, 142 U.S. 547, 585, 586 (1892).

The only evidence offered by the Government consisted of the letter of authorization, statements of the Special Attorney and the questions propounded to Marcus.

The letter of authorization is of little probative value and, if anything, tends to show that the proceeding has no bounds and is not to be in any way directed to any specific inquiry.

The statements of the Special Attorney indicate rather clearly that the dominant purpose is not the enforcement of the Communications Act but rather the enforcement of 18 U.S.C. § 1084.

The questions propounded to the witness are susceptible of many interpretations; they clearly do not disclose that the proceeding was brought essentially for the enforcement of the Communications Act.

It is accordingly submitted that the Government's evidence as to the nature of the proceeding falls far short of showing that it was beyond doubt one in which the immunity provisions of the Communications Act could lawfully be used.

V. THE PURPORTED GRANT OF IMMUNITY, NOT HAVING BEEN SHOWN TO BE AUTHORIZED BY CONGRESS, IS INEFFECTIVE TO GIVE PROTECTION COEXTENSIVE WITH THE CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION, AND THE WITNESS SHOULD NOT HAVE BEEN ORDERED TO ANSWER OR ADJUDGED IN CONTEMPT FOR FAILURE TO DO SO.

As already seen (*supra*, pp. 8-13), the record not only shows that the Government failed clearly to establish that the proceeding was based upon or grew out of violations of the Communications Act but it demonstrates that it was based upon violations of the Race Wire Act and the Internal Revenue Code, and that the attempted use of the immunity provision was therefore in a manner not authorized by Congress.

A. The right to grant immunity in exchange for self-incriminating evidence does not exist apart from statute.

Since earliest times the common law has frowned upon obtaining evidence, whether by confession or otherwise, by means of force, threat, fear, bargains, promises, deceit or illegal means.

It has long been held that evidence so obtained is inadmissible.

Commonwealth v. *Chabbock*, 1 Mass. 143 (1804).
Commonwealth v. *Taylor*, 5 Cush. 605 (1849).
Bram v. *United States*, 168 U.S. 532 (1897).

These common-law doctrines were incorporated into the guaranties of the Fifth and Fourteenth Amendments to the Constitution, and decisions construing these amendments have reiterated and enforced the ancient principles.

Chambers v. *Florida*, 309 U.S. 227 (1940).
Leyra v. *Denno*, 347 U.S. 556 (1954).

So it has been held that a United States Attorney has no authority in the absence of statute to grant immunity.

United States v. *Ford*, 99 U.S. 594 (1878).
United States v. *Hinz*, 35 Fed. 272 (C.C. Cal., 1888).
Alexander v. *United States*, 181 F. 2d 480 (C.A. 9th, 1950).
Healey v. *United States*, 186 F. 2d 164 (C.A. 9th, 1950).

B. A witness may not be deprived of his constitutional privilege against self-incrimination by an offer of immunity not authorized by statute.

It follows from the well-settled common-law rules above that an offer of immunity which is not provided for by statute will not deprive the witness of his right to refuse to give self-incriminating testimony.

Hooley v. *United States*, 209 F. 2d 234 (C.A. 1st, 1954).

As the Court said in the *Hooley* case:

"At this point it is hardly necessary to observe that the privilege, if otherwise properly invoked, is not defeated by the assurance of the U. S. Attorney that the witness will be held immune from indictment on account

of any admissions which may be elicited from her." (Pp. 235, 236.)

Isaacs v. *United States*, 256 F. 2d 654 (C.A. 8th, 1958).
Healy v. *United States*, 186 F. 2d 164 (C.A. 9th, 1950).

Even the tender of a Presidential pardon will not deprive a witness of his privilege.

Burdick v. *United States*, 236 U.S. 79 (1915).

Unless, therefore, the grant of immunity was authorized by the Act, the petitioner could not be deprived of his privilege and compelled to testify.

C. Even when granted by statute, the grant must afford a protection from prosecution as effective and as broad as that provided by the constitutional privilege which it supplants before the witness may be compelled to relinquish the protection of his constitutional rights.

This proposition is now too well settled to require elaboration.

Counselman v. *Hitchcock*, 142 U.S. 547 (1892).
Smith v. *United States*, 337 U.S. 137 (1949).

D. Lacking a valid grant of immunity, the order compelling the petitioner to testify was invalid and the refusal to obey was not punishable as contempt.

That disobedience of an invalid order is not punishable as contempt has long been well settled and requires no extensive citation of authorities.

Blau v. *United States*, 340 U.S. 332 (1951).

Conclusion.

If the judgment below is allowed to stand, it will permit the use by the Government of similar immunity provisions in many other Acts in a manner which is unauthorized, contrary to Congressional sanction and intent and in violation of the constitutional rights of witnesses.

For the reasons set forth herein, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM B. SLEIGH, JR.,

MAX J. ZIEMAN,

Counsel for the Petitioner.

December, 1962.

Appendix.

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,013

ARTHUR MARCUS, *Appellant*
v.
UNITED STATES OF AMERICA, *Appellee*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued October 19, 1962

Before: McLAUGHLIN and HASTIE, *Circuit Judges;* and DUMBAULD, *District Judge.*

OPINION OF THE COURT
(Filed November 28, 1962)

By DUMBAULD, *District Judge:*

Appellant, Arthur Marcus, a resident of Massachusetts, was called as a witness before a federal grand jury at Wilmington, Delaware, on April 2, 1962. He was advised of his rights under the Fifth Amendment, and thereupon refused to answer, relying upon his constitutional privilege against self-incrimination, when asked if he had been investigated by the Massachusetts Crime Commission in 1957 and whether he had in 1955 appealed to the Massachusetts Public Utilities Commission because the telephone company had refused to install twelve telephones in his office, and

when asked many other questions. He frequently left the grand jury room to consult with counsel in the corridor, but refused to answer any questions, except for a few questions as to his height, weight, age, and marital status, concerning which he added the comment that in his or his counsel's opinion such questions were not germane to the inquiry. The questions asked plainly showed that the inquiry was concerned, *inter alia*, with unlawful use of telephones to transmit gambling information.

Government counsel on the same date applied to the Court, for an order directing the witness to answer questions, in exchange for the immunity conferred by 47 U.S.C. 409(1), which provides:

> "No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, and documents before the Commission, or in obedience to the subpena of the Commission, whether such subpena be signed or issued by one or more commissioners, or *in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this chapter*, or of any amendments thereto, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but *no individual shall be prosecuted* or subjected to any penalty or forfeiture *for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege* against self-incrimination, *to testify* or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying." (Italics supplied)

This provision is Section 409(a)(i) of the Communications Act of June 19, 1934, 48 Stat. 1064, 1097, renumbered as Section 409(1) by the Act of July 16, 1952, 66 Stat. 710, 722. The only variation between the two texts is that "chapter" is substituted for "Act" in the U.S.C. version. The provision is therefore applicable in any criminal proceeding involving alleged violation of the Communications Act.

After hearing and argument, the Court on April 17, 1962, entered an order granting the application for immunization of the witness, who, together with the grand jury, appeared in open court on April 18, 1962, at which time the Court explained the situation and said, *inter alia*, "Mr. Marcus, I order you to answer completely and truthfully all questions propounded to you in the course of you[r] forthcoming appearance before the grand jury." (Tr. 99; 40-A).

This language of the court is to be read in context with the request of the Government attorney indicating the scope of the questions to be asked and of the inquiry itself. Above all it should be remembered that the dispositive factor as to the court's direction is that the questions which were actually asked of appellant were directly within the purview of the investigation.

Within less than an hour the attorneys were in Chief Judge Wright's chambers, reporting that the witness was still recalcitrant. To comply with the notice provisions of Criminal Rule 42(b), a hearing in open court was held at which the Court permitted the reporter to read the questions and answers of the witness before the grand jury. This record showed that on being asked questions he refused to answer, after having repeatedly consulted counsel in the corridor. A hearing for trial on the contempt charge was set for the following day.

On April 19, 1962, Marcus was tried for contempt, without a jury. The reporter testified from his notes, reading the questions and answers before the grand jury. There was no other testimony, but Marcus contended that the immunity statute was inapplicable or unconstitutional. Judge Wright thereupon found the defendant guilty of contempt, and after the usual ritual [see *Green* v. *U.S.*, 365 U.S. 301, 304-305 (1961)] imposed a six months sentence (indicating that within sixty days the sentence could be reduced if Marcus testified). The District Court denied bail pending appeal, but this Court, after a hearing before Chief Judge Biggs on the same day (and subsequently by order of April 24, 1962) enlarged Marcus on $15,000 bail, with permission to return to Massachusetts. The matter is now before us on an appeal by Marcus from the sentence.

Appellant's position is utterly without merit. It is elementary that a grand jury is an arm of the court, and that refusal to comply with an order of court directing a witness to answer proper questions before the grand jury is a contempt of court. Since the refusal was persisted in even when the witness was afforded a *locus poenitentiae* and brought before the Court, where the situation was explained fully to him, the refusal was a contempt committed in the actual presence of the court and punishable summarily and without a jury trial in accordance with Criminal Rule 42(a). *Brown* v. *U.S.*, 359 U.S. 41, 49-51 (1959); *Levine* v. *U.S.*, 362 U.S. 610, 617 (1960).

A witness is of course entitled to his constitutional right under the Fifth Amendment. But if an immunity is granted him by statute, as extensive as his privilege (or, as here, more extensive) he may be compelled to testify. *Brown v. Walker*, 161 U.S. 591, 594, 597-601 (1896); *Counselman v. Hitchcock*, 142 U.S. 547, 585-86 (1892); *Hale v. Henkel*, 201 U.S. 43, 67 (1906); *Heike v. U.S.*, 227 U.S. 131, 141 (1913).

The immunity conferred by the statute involved here, like that in *Brown v. U.S.*, *supra*, is the automatic statutory consequence of compulsory testimony.[1] The immunity is as extensive as the testimony. The contention is groundless that the immunity conferred is limited to proceedings based upon or growing out of the Communications Act.[2] As stated in *Brown*, the reference to that Act "limits only the class of witnesses to whom the immunity will attach, not the scope of the immunity conferred." 359 U.S. at 47.

Indeed the facts in the *Brown* case are so closely parallel to those in the case at bar that petitioner's appeal is well-nigh frivolous.[3]

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[1] The immunity provision of the Communications Act is self-executing, unlike the provisions of 18 U.S.C. 3486 or 18 U.S.C. 1406, where obtaining a court order is a necessary condition precedent to the grant of immunity. *Ullmann* v. *U. S.*, 350 U.S. 422, 431-33 (1956); *Reina* v. *U.S.*, 364 U.S. 507, 509 (1960). If, as appellant alleges, the District Court here has no statutory jurisdiction (in analogy to the procedure under 18 U.S.C. 3486) to make the order of April 17, 1962, the consequence is merely that such order is surplusage and the conviction is to be sustained for violation of the order of April 18, 1962, which the Court had inherent power to make regardless of statutory authorization. There was also power under 18 U.S.C. 401 to punish for this type of contempt.

[2] Equally unfounded is appellant's assumption that his testimony must be limited to violations of that Act, and that the Court should not have directed him to answer *all* questions. A witness cannot control the scope of a grand jury investigation or challenge the relevancy of questions asked. *Hale* v. *Henkel*, 201 U.S. 43, 65 (1906); *Nelson* v. *U.S.*, 201 U.S. 92, 115 (1906).

[3] Perhaps the appellant in *Brown* had a stronger case than here, because the immunity provision of the Interstate Commerce Act is contained in Part I thereof, and was made applicable to Part II thereof by incorporation by reference. See 359 U.S. at 44. The immunity provision of the Communications Act is direct and self-contained. Since in *Brown*, as here, a claim of privilege was made *in limine*, nothing turns on the distinction between pre-1933 immunity provisions such as that in the Interstate Commerce Act and those like 47 U.S.C. 409(1). See *U.S.* v. *Monia*, 317 U.S. 424, 429-30 (1943); and *Smith* v. *U.S.*, 337 U.S. 137, 147-48 (1949). In the

Does appellant fall within "the class of witnesses" to whom the statutory immunity under 47 U.S.C. 409(1) attaches? Plainly the answer must be in the affirmative.

The class is described as being composed of persons compelled to testify "in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this [Communications] Act."[4]

Obviously a grand jury proceeding is a "proceeding" ("criminal" in nature) under this language. *Hale v. Henkel*, 201 U.S. 43, 66 (1906); *Levine v. U.S.*, 362 U.S. 610, 617 (1960); see also 359 U.S. at 46.

Was the proceeding one involving the Communications Act?

Obviously the grand jury under its general powers could investigate within a wide field, dealing with violations of many statutes, including the Communications Act.

But the authorization appointing Joseph Corey as a Special Attorney and authorizing him to take part in grand jury proceedings in the District of Delaware referred specifically to "Federal Communications Act, transmission of gambling information" and kindred offenses. When Mr. Corey came into court on April 2, 1962, he informed the Court that: "The grand jury is inquiring into violations under statute [18 U.S.C.] 1084, under the transmission of interstate wagering information; also under . . . [various other statutes including] the Federal Communications Act, if I haven't already mentioned it" (Tr. 2).

The nature of the questions themselves which Marcus refused to answer plainly shows that unlawful use of tele-

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case of statutes of the latter type, the scope of the immunity is determined by acceptance of the witness's claim for immunity at the time it is made. *U.S.* v. *Onassis*, 125 F. Supp. 199, 201 (D.C. 1954).

[4] Hence it is the "proceeding", not necessarily the indictment or indictments resulting therefrom, which must be based upon the Communications Act. The indictments might deal with income tax violations, conspiracy charges, or various other offenses.

phone communication in connection with gambling and racketeering was involved.

In the light of these specific declarations, the government could not later contend that the Communications Act was not within the scope of these grand jury proceedings.

Of course there is no immunity earned until Marcus in fact testifies. So long as he refuses to testify he is still subject to prosecution, if the government can make out a case against him by other evidence than his own. But so soon as he testifies, under compulsion of the Court's order, he automatically will receive immunity, from both federal and State prosecution, for any matter or thing concerning which he in fact testifies, so long as his testimony is not volunteered but is elicited by questions which the Court has ordered him to answer. This would include matters affectings [*sic*] his income tax liability or any other matter brought out as part of the grand jury inquiry. It is of course the task of the government attorneys to ensure that the witness is not given an immunity broader than is necessary and expedient to advance the important objectives of the grand jury's investigation.

One further argument advanced by appellant remains to be noticed. It is contended that the immunity provision of the Communications Act is repugnant to the terms and policy of 18 U.S.C. 1084 which penalizes interstate transmission of gambling information. That legislation, it is said, aims at aiding State authorities in their task of repressing gambling. Therefore it is incongruous that action by a federal grand jury should have the effect of conferring immunity against State prosecution. Attention is directed by appellant to 18 U.S.C. 1084(c) which provides:

> "Nothing contained in this section shall create immunity from criminal prosecution under the laws of any State, Commonwealth of Puerto Rico, territory, possession or the District of Columbia."

But it is plain that this provision merely declares that "*this section*" [*i.e,* 18 U.S.C. 1084] shall not have the effect of conferring immunity from State prosecution. It does not derogate from the effects of *other* statutes (such as the Communications Act and many others) which *do* confer immunity. Where immunity is so granted, of course by virtue of the Supremacy Clause it supersedes and takes precedence over State law and policy with respect to prosecution of gamblers. *Reina v. U.S.*, 364 U.S. 507, 511-12 (1960).

In his reply brief (p. 13) appellant contends that his "compelled testimony presumably would be turned over to the states to enable the states to prosecute other persons who may have violated the states' gambling laws." This if so would be none of appellant's concern. His constitutional rights under the Fifth Amendment, and the corresponding immunity derived therefrom, cannot be used by him to protect other parties. *Hale v. Henkel*, 201 U.S. 43, 69 (1906); *Rogers v. U.S.*, 340 U.S. 367, 371 (1951). For example, the grand jury might well have occasion to indict a telephone company for various possible violations of the Communications Act growing out of service furnished to appellant in connection with gambling activities. But appellant would have no legal right to hinder or obstruct such action. He is not entitled by the Constitution to claim the privilege of silence in order to shield his associates or those with whom he has had dealings.

There is no merit in any of the arguments advanced by appellant. The judgment of the District Court will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Pertinent Provisions of the Federal Communications Act (47 U.S.C. §§ 151-609).

§ 409. HEARINGS.

(a) Filing of initial decisions; exceptions.

In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated by the Commission for hearing, the person or persons conducting the hearing shall prepare and file an initial, tentative, or recommended decision, except where such person or persons become unavailable to the Commission or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision.

(b) Exceptions to initial decisions; memoranda; determination of Commission or authority within Commission; prohibition against consideration of own decision.

In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated by the Commission for hearing, any party to the proceeding shall be permitted to file exceptions and memoranda in support thereof to the initial, tentative, or recommended decision, which shall be passed upon by the Commission or by the authority within the Commission, if any, to whom the function of passing upon the exceptions is delegated under section 155(d) (1) of this title: *Provided, however,* That such authority shall not be the same authority which made the decision to which the exception is taken.

(c) Notice and opportunity for participation by parties; applicability of Administrative Procedure Act.

(1) In any case of adjudication (as defined in the Administrative Procedure Act) which has been designated

by the Commission for a hearing, no person who has participated in the presentation or preparation for presentation of such case at the hearing or upon review shall (except to the extent required for the disposition of ex parte matters as authorized by law) directly or indirectly make any additional presentation respecting such case to the hearing officer or officers or to the Commission, or to any authority within the Commission to whom, in such case, review functions have been delegated by the Commission under section 155(d) (1) of this title, unless upon notice and opportunity for all parties to participate.

(2) The provision in subsection (c) of section 1004 of Title 5 which states that such subsection shall not apply in determining applications for initial licenses, shall not be applicable hereafter in the case of applications for initial licenses before the Federal Communications Commission.

(d) Applicability of Administrative Procedure Act.

To the extent that the foregoing provisions of this section and section 155(d) of this title are in conflict with the provisions of the Administrative Procedure Act, such provisions of this section and section 155(d) of this title shall be held to supersede and modify the provisions of that Act.

(e) Subpenas; witnesses; production of documents; fees and mileage.

For the purposes of this chapter the Commission shall have the power to require by subpena the attendance and testimony of witnesses and the production of all books, papers, schedules of charges, contracts, agreements, and documents relating to any matter under investigation. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(f) Designated place of hearing; aid in enforcement of orders.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

(g) Contempts.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpena issued to any common carrier or licensee or other person, issue an order requiring such common carrier, licensee, or other person to appear before the Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(h) Depositions.

The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any

court of the United States, or any United States commissioner, or any clerk of a district court, or any chancellor, justice, or judge of a supreme or superior court, mayor, or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission, as hereinbefore provided.

(i) Oaths; testimony in writing.

Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

(j) Foreign depositions.

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

(k) Deposition fees.

Witnesses whose depositions are taken as authorized in this chapter, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(l) Self-incrimination.

No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, and documents before the Commission, or in obedience to the subpena of the Commission, whether such subpena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this chapter, or of any amendments thereto, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(m) Penalties.

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, schedules of charges, contracts, agreements, and documents, if in his power to do so, in obedience to the subpena or lawful requirement of the Commission, shall be guilty of a misdemeanor and upon conviction thereof by

a court of competent jurisdiction shall be punished by a fine of not less than $100 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment. (June 19, 1934, ch. 652, § 409, 48 Stat. 1096; amended July 16, 1952, ch. 879, § 16, 66 Stat. 721; Aug. 31, 1961, Pub. L. 87-192, § 4, 75 Stat. 422.)

Transmission of Wagering Information Act (18 U.S.C. § 1084).

§ 1084. TRANSMISSION OF WAGERING INFORMATION; PENALTIES.

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting or sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudge the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored. (Added Pub. L. 87-216, § 2, Sept. 13, 1961, 75 Stat. 491.)